UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LYNNE STRASENBURGH o/b/o T.S.,	)	
Plaintiff	)	
v.	)	***Docket No. 03-140-B-W***
JO ANNE B. BARNHART, Commissioner of Social Security,	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION[1]

This Supplemental Security Income ("SSI") appeal raises the question whether the commissioner correctly concluded that Lynne Strasenburgh ("Plaintiff"), representative payee for her disabled son T.S. ("Beneficiary"), is liable for repayment of $620.37 in funds allegedly knowingly misapplied from a so-called "dedicated account." I recommend that the decision of the commissioner be affirmed.

Following a hearing held on March 20, 2003, *see* Record at 15, an administrative law judge found that the Plaintiff was the sole custodial parent of the Beneficiary, a minor child, who was a recipient of SSI payments based upon disability, Finding 1, *id*. at 12; that the Plaintiff was also the Beneficiary's

[1] This action is properly brought under 42 U.S.C. § 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on August 20, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

representative payee, Finding 2, *id*.; that when the Beneficiary initially became eligible for SSI payments, the sum of $4,473.67 of his past benefits was placed in a dedicated account, Finding 3, *id*.; that the Plaintiff spent $620.37 of the funds in the account on items she purchased for the Beneficiary that did not constitute permissible expenditures pursuant to 20 C.F.R. § 416.640, Finding 4, *id*.; and that the Plaintiff knowingly failed to seek prior approval for the expenditures despite having agreed in writing in October 1999 to seek prior authorization from the Social Security Administration before using any of the funds to purchase any items for which expenditure was permissible, Finding 5, *id*. The Appeals Council declined to review the decision, *id*. at 2-4, making it the final determination of the commissioner, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs*., 647 F.2d 218, 222 (1st Cir. 1981).

The Plaintiff, proceeding *pro se*, states that (i) she feels that some of the money spent for the Beneficiary was justified – winter coat, boots, hat and mittens, and (ii) she thought the computer software that she bought, including sports software, was permissible, given that that her son has ADHD and OCD and the time he spends on the computer helps him to stay focused. *See generally* Statement of Errors (Docket No. 16). Although these are the sole points of error articulated in her Statement of Errors, she also testified at hearing before the administrative law judge, and reiterated at oral argument before me, that (i)

she did not realize that spending for clothing was impermissible, *see* Record at 15, and (ii) the requested repayment would work a financial hardship, *see id*. at 16. I discern no reversible error.

I. Discussion

The commissioner initially determined on March 21, 2002 that the Plaintiff had misapplied $620.37 of a total of $700.35 in funds withdrawn from the Beneficiary's dedicated account. *See id*. at 26. Expenditures of $49.99 for Read, Write, Type software and $29.99 for Reading Club software were deemed allowable; however, the commissioner determined that expenditures of $39.99 for NBA Live software, $39.99 for NHL Live software and $540.39 for clothing were misapplied. *See id*.

The Plaintiff takes pains to defend the purchases in question as justifiable. *See generally* Statement of Errors. However, the administrative law judge supportably found that she improperly spent monies on clothing and sports software for her son. Social Security regulations state, in relevant part:

> (2) A representative payee shall use dedicated account funds . . . for the benefit of the child and only for the following allowable expenses –
>
> (i) Medical treatment and education or job skills training;
>
> (ii) If related to the child's impairment(s), personal needs assistance; special equipment; housing modification; and therapy or rehabilitation; or
>
> (iii) Other items and services related to the child's impairment(s) that we determine to be appropriate. The representative payee must explain why or how the other item or service relates to the impairment(s) of the child.
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> ***
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> (4) The use of funds from a dedicated account in any manner not authorized by this section constitutes a misapplication of benefits. These misapplied benefits are not an overpayment as defined in § 416.537;[2] however, if we determine that a representative

[2] An "overpayment" is defined as "payment of more than the amount due for any period[.]" 20 C.F.R. § 416.537(a).

> payee knowingly misapplied funds in a dedicated account, that representative payee shall be liable to us in an amount equal to the total amount of the misapplied funds.

20 C.F.R. § 416.640(e). In addition, the commissioner's Program Operations Manual System ("POMS"), which glosses this regulation, makes clear that "[b]asic maintenance costs (food, housing, clothing, and personal items) not related to the child's impairment . . . may not be paid with dedicated account funds." POMS § GN 00602.140(B)(4). The Plaintiff makes no argument that the clothing items in question were related to her son's impairment; rather, from all that appears, they were garden-variety winter apparel. Nor is there any evidence that the Plaintiff's local Social Security office approved expenditures for the clothing in question. Thus, funds spent for that clothing were misapplied.

The Plaintiff argues, evidently for the first time on appeal, that the NBA Live and NHL Live software can be classified as "educational." *See* Statement of Errors.[3] However, at hearing before the administrative law judge she conceded that those two video games were not educational, *see* Record at 15, and the administrative law judge supportably found that they were not, *see id*. at 11. Inasmuch as there is no indication she sought prior approval for those expenditures, they too correctly were found not to be allowable expenditures.[4]

The only remaining issue is whether the administrative law judge supportably found that the Plaintiff "knowingly misapplied" the funds in question from her son's dedicated account. I find that he did. The Record reveals that on October 26, 1999 the Plaintiff signed a Statement of Claimant or Other Person certifying, *inter alia*, with respect to the dedicated account in issue:

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[3] In a related vein, she posited at oral argument that these particular video games were "therapeutic" and disability-related in that they helped her son stay focused on tasks.

[4] At hearing before the administrative law judge and again at oral argument before me, the Plaintiff also pressed a claim of financial hardship. *See* Record at 17. As the administrative law judge advised the Plaintiff at hearing, *see id*., and as counsel for the commissioner observed at oral argument, in this context (as opposed to the context of an overpayment), *(continued on next page)*

I understand that this money must be deposited in a separate account to be used for medical treatment or education or job skills training.

I also understand that the following expenses are also allowed if the[y] benefit [the Beneficiary] and are related to his disability.

1) personal needs assistance

2) special equipment

3) housing modification

4) therapy or rehabilitation

5) other items or services approved by my local Social Security Office

I agree to request in writing, prior authorization from my local Social Security Office before using any of the funds in the separate account to purchase items listed above.

Id. at 21 (emphasis in original). The administrative law judge found, in relevant part:

> [The Plaintiff] credibly takes the position that *at the time the expenditures were made* she "did not realize that buying clothes for [the Beneficiary] was not acceptable", having *forgotten* what constituted permissible expenditures, and that repaying $620.37 "would be a real hardship for [the Beneficiary] and me" (Exhibit 6). However, *she does not maintain that she had forgotten her obligation to seek prior approval for the expenditures*. I can only conclude that she knowingly failed to do so.

Id. at 11 (emphasis in original).

At oral argument, counsel for the commissioner cited 20 C.F.R. § 416.640(e)(2)(iii), (3)-(4) for the proposition that a knowing failure to seek preapproval of an expenditure is as much a knowing misapplication of dedicated funds as is purchase of an item known to be impermissible. The cited regulation does not expressly state that a representative payee must obtain preapproval of "[o]ther items and services" – that is, non-listed items and services such as clothing. *See* 20 C.F.R. § 416.640(e)(2). However, I agree

there is no provision for waiver on the ground of hardship. *See* POMS § SI 02220.060(C) & (D)(4)(a).

with counsel for the commissioner that the language nonetheless contemplates such an affirmative obligation inasmuch as it requires a representative payee to expend dedicated funds only on, *inter alia*, "[o]ther items and services related to the child's impairment(s) that we [the Social Security Administration] determine to be appropriate," adding: "The representative payee must explain why or how the other item or service relates to the impairment(s) of the child." *Id*. § 416.640(e)(2)(iii).

Importantly, the regulation then goes on to provide: "The use of funds from a dedicated account *in any manner not authorized by this section* constitutes a misapplication of benefits. . . . [I]f we determine that a representative payee knowingly misapplied funds in a dedicated account, that representative payee shall be liable to us in an amount equal to the total amount of the misapplied funds." *Id*. § 416.640(e)(4) (emphasis added). The purchase of "[o]ther items and services" without the contemplated preapproval is a use of funds in a "manner not authorized" by the relevant regulation, and thus is a misapplication of benefits.

The administrative law judge supportably found that the Plaintiff knowingly misapplied funds in a dedicated account – despite not actually knowing at the time that the particular items purchased were impermissible – by virtue of (i) her signature on a 1999 statement acknowledging an obligation to seek preapproval of any expenditures from the dedicated account, (ii) the failure of the Record to reflect any claim that she had forgotten the obligation to seek preapproval, and (iii) her failure to seek preapproval for the clothing or sports-software purchases.

The decision therefore must be affirmed. Although, as mentioned above, financial hardship is not a ground on which the Plaintiff can be relieved from the duty of repayment, at oral argument, counsel for the commissioner acknowledged a willingness to work out a repayment plan with the Plaintiff to minimize that hardship.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 25th day of August, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

LYNNE STRASENBURGH, *On behalf of her minor son T S*	represented by	**LYNNE STRASENBURGH** P.O. BOX 215 BLUE HILL, ME 04614 207-374-5452 PRO SE

V.

Defendant

SOCIAL SECURITY ADMINISTRATION COMMISSIONER	represented by	**ESKUNDER BOYD** SOCIAL SECURITY ADMINISTRATION OFFICE OF GENERAL COUNSEL, REGION I 625 J.F.K. FEDERAL BUILDING BOSTON, MA 02203 617/565-4277

Email: eskunder.boyd@ssa.gov
ATTORNEY TO BE NOTICED

JAMES M. MOORE
OFFICE OF THE U.S. ATTORNEY
DISTRICT OF MAINE
P.O. BOX 2460
BANGOR, ME 4402-2460
945-0344
Email: jim.moore@usdoj.gov
ATTORNEY TO BE NOTICED